No. _____

IN THE

Supreme Court of the United States

PAUL W. PARKER, as Personal Representative of the Estate of Curtis John Rookaird

Applicant,

v.

BNSF RAILWAY COMPANY, a Delaware corporation

Respondent.

Application for Extension of Time to File Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPLICATION TO THE HONORABLE JUSTICE ELENA KAGAN AS CIRCUIT JUSTICE

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To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicant Paul Parker, respectfully requests that the time to file its petition for a writ of certiorari be extended for 60 days, up to and including Monday, October 13, 2025. The Court of Appeals issued its opinion on May 15, 2025 (Exhibit A). Absent an extension of time, the petition would be due August 13, 2025. The jurisdiction of this Court is based on 28 U.S.C. 1254(1). This request has been sent to counsel for BNSF and as of the time of this filing has not responded to this request. It is unknown whether this request is opposed or unopposed.

Background

This case presents an important and recurring question about the proper standard of appellate review for an employer's affirmative defense under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, and how courts apply its incorporated burden-shifting framework from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121(b). Specifically, the first question is whether a district court's determination that an employer met its burden to prove, by "clear and convincing evidence," that it would have taken the same adverse action absent the employee's protected activity is a mixed question of law and fact subject to de novo review—or a purely factual finding reviewed only for clear error in light of the Supreme Court case *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018). The second question is whether and to what extent evidence showing an employee's protected activity was a contributing factor in the unfavorable personnel action at step one is incorporated into the employer's separate same-action affirmative defense at step two.

This case arises under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, which prohibits rail carriers from retaliating against employees for engaging in protected safety-related activities. The statute incorporates the burden-shifting framework of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121(b), under which an employer may avoid liability only by proving, by "clear and convincing evidence," that it would have taken the same adverse action absent the protected activity.

Curtis Rookaird, a conductor for BNSF Railway Company, was terminated after a single shift in February 2010. During that shift, Rookaird and his crew performed an air-brake test on railcars—a safety procedure that BNSF later claimed was unnecessary and contributed to inefficiency. BNSF cited four reasons for the termination: inefficiency, dishonesty in reporting time, failure to sign a timesheet, and failure to comply with instructions. Rookaird filed suit under the FRSA, alleging that his termination was in retaliation for engaging in protected activity.

Notably, a jury previously found that BNSF had failed to prove its affirmative defense by clear and convincing evidence, however, the Ninth Circuit vacated the verdict and remanded on issues related to Plaintiff's initial burden. On remand, the parties stipulated to a bench trial. The district court found that Rookaird had met his burden to show that the protected activity was a contributing factor in his termination. However, contrary to the original jury verdict, the court also found that BNSF had met its affirmative defense by proving, by clear and convincing evidence, that it would have fired Rookaird even absent the protected activity. The district court came to this conclusion citing Rookaird's single unsigned time-sheet as significant and dismissible, a 28-minute discrepancy on a timesheet that did not result in overpay as grossly dishonest and dismissible, and it insubordinate and dismissible for Rookaird to have eaten his lunch in the breakroom before leaving after being told to go home for the day. The district court concluded the

air brake test BNSF identified as a "primary element" as contributing "very little" and that is sufficient clear and convincing evidence that BNSF would have taken the same action, absent the air brake test. Rookaird's personal representative of his estate, Paul Parker, challenged that conclusion presenting whether "[u]nder de novo review, were the district court's application of FRSA law to its established facts improper as a matter of law and therefore the district court's affirmative defense ruling in favor of BNSF must be reversed?"

On appeal, a divided Ninth Circuit panel reversed, but then the en banc court reinstated the district court's judgment. The en banc majority held that the district court applied the correct legal standard and that its finding on the affirmative defense was "purely factual," subject only to clear error review. See *Parker v. BNSF Ry. Co.*, No. 22-35695, slip op. at 20 n.3 (9th Cir. May 15, 2025). The court affirmed, concluding that BNSF had carried its burden under the AIR21 burden shifting framework.

On another note, a writ of certiorari was recently filed with this court regarding a similar question related whether and to what extent evidence showing an employee's protected activity was a contributing factor in the unfavorable personnel action at step one is incorporated into the employer's separate same-action affirmative defense at step two. *See BofI Federal Bank v. Charles Matthey Erhart*, filed July 24, 2025.

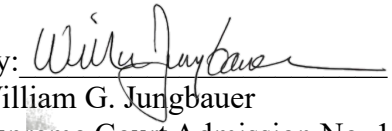
Reasons for Granting an Extension of Time

On October 14, 2024, the attorney for Plaintiff on appeal and principal brief writer on appeal, Cyle Cramer, changed law firms and took on a significant new workload. Additionally, attorney Mr. Cramer welcomed a new baby on July 15, 2025, two weeks ahead of the due date and is currently on paternity leave. This is the second child for Mr. Cramer and his wife Gina, who is a physician.

There is also the press of business for Messrs. Jungbauer and Magnuson, the only two attorneys in the firm of Yaeger & Jungbauer Barristers. Between Messrs. Jungbauer and Magnuson, they are handling approximately 25 active and prospective cases under the Federal Employers' Liability Act, 45 U.S.C. Section 51 *et seq.*, and the Federal Rail Safety Act 49 U.S.C. Section 20109 and general personal injury matters. These matters are pending throughout the Midwest and Western United States.

Conclusion

Applicant requests that the time to file a writ of certiorari in the above-captioned matter be extended 60 days to and including October 13, 2025.

By: 

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